CORRECTED COPY

78-1876



IN THE

# Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-

DEL RIO DISTRIBUTORS, INC.,
*Petitioner,*

v.

ADOLPH COORS COMPANY,
*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JAMES R. WARNCKE
1140 Milam Building
San Antonio, Texas 78205
(512) 227-6305

Attorney For Petitioner
Del Rio Distributors, Inc.

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

TABLE OF CONTENTS

## TABLE OF AUTHORITIES



CASES: Page



STATUTES: Page

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-

DEL RIO DISTRIBUTORS, INC., *Petitioner,*
v.
ADOLPH COORS COMPANY, *Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Del Rio Distributors, Inc., petitions for writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

### OPINIONS BELOW

The District Court wrote no opinion in this case. The opinion of the United States Court of Appeals for the Fifth Circuit is annexed hereto as Appendix A and is reported at 589 F.2d 176.

### JURISDICTION

The Judgment of the Court of Appeals was entered on February 6, 1979, and is annexed hereto as Appendix B. A timely Petition for Rehearing and Rehearing En Banc was denied on May 7, 1979, by order annexed as Appendix C. The jurisdiction of this Court is invoked under 28 U.S.C., §1254(1).

## QUESTION PRESENTED

Whether a restraint of trade (vertical territorial restriction) imposed by a manufacturer upon its distributor, wholly within the boundaries of a state, can be reasonable under the Sherman Act rule of reason, when such restraint constitutes a per se felony violation of the antitrust law of the state wherein it is imposed; or, whether same must be unlawful as a matter of law.[1]

## STATUTES INVOLVED

The relevant provisions of the 21st Amendment to the Constitution and of Section 1 of the Sherman Act, §1, 26 Stat. 209 (1890), 15 U.S.C. §1, involved in this case, are set forth in Appendix D. The relevant provisions of the Texas Constitution and Texas antitrust statutes involved in this case, Article 1, §26 Constitution of the State of Texas, and Sections 15.01, 15.02, 15.03, 15.04, and 15.33 of the Texas Business and Commerce Code, in effect from September 1, 1967, and Articles 7426, 7427, and 7428, Vernon's Annotated Civil Statutes of the State of Texas, in effect prior to September 1, 1967, are set forth in Appendix E.

## STATEMENT OF THE CASE

Petitioner, Plaintiff below, Del Rio Distributors,

[1] Subsidiary to this question is the further question whether the federal antitrust laws preempt state antitrust laws concerning a restraint of trade imposed wholly within the state in question and, if so, whether that preemption still obtains over commerce in alcoholic beverages in view of the 21st Amendment to the Constitution.



Inc. (Del Rio), commenced business in December, 1966, as the exclusive distributor for the Respondent, Defendant below, Adolph Coors Company (Coors), in ten Texas counties, including and surrounding Del Rio, Texas. Coors brewed its beer in Colorado and shipped it to Del Rio in Texas.

It is undisputed that, while Del Rio served as Coors' distributor, and until terminated as such by Coors, Del Rio was restricted by Coors to wholesaling its beer solely within its designated ten county area of Texas. Coors beer had not been distributed in Del Rio's territory prior to its commencement of business in that area. Del Rio, in plowing the virgin soil for Coors beer, operated at a loss until the year 1971, when it first showed a profit. At that time, Coors notified Del Rio that it was to be terminated as its distributor, which termination finally became effective December 1, 1971, at which time Del Rio went out of business.

This action was instituted by Del Rio against Coors in the United States District Court for the Midland-Odessa Division of the Western District of Texas, on April 26, 1972. In its complaint, Del Rio claimed treble damages under the Clayton Act for violations of Section 1 of the Sherman Act by Coors in imposing vertical territorial restrictions upon it, fixing its prices and wrongfully terminating Del Rio as its distributor to insure enforcement of its territorial restrictions and price-fixing activities.

Del Rio's original complaint contained a pendent claim under the antitrust laws of the State of Texas. This pendent claim was abandoned by Del Rio in the pre-trial order, dated February 25, 1977, to induce

Coors to agree to its entry.[2] Del Rio further moved the District Court to take judicial notice of the rulings in *Copper Liquor, Inc.* v. *Adolph Coors Company* and *Adolph Coors Company* v. *Federal Trade Commission*, 497 F. 2d 1178, cert. den. 419 U.S. 1105, wherein it was decided that Coors' territorial restrictions were a per se violation of the Sherman Act and that it had further violated that Act in imposing retail and wholesale price-fixing. The pre-trial order presented Del Rio's contention that Coors' territorial restrictions constituted a per se violation and that Coors was further collaterally estopped on the question of liability under the decisions in *Copper Liquor* and the *F.T.C.* cases.

After having prepared for trial for some five years under the settled law that territorial restrictions were per se illegal, Del Rio proceeded to trial before a jury in Midland, Texas, on the 20th day of June, 1977. Del Rio rested its case on June 23, 1977, the same day this Court handed down its ruling in *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36, 97 S. Ct. 2549, 53 L. Ed. 2d 568 (1977), overruling the per se *Schwinn* rule and reinstating the "rule of reason" under the Sherman Act for territorial restraints.

[2] Although it has long been clearly decided that territorial restrictions constituted a per se violation of the Texas antitrust laws, the Texas law allowed only single rather than treble damages, and, in view of the Fifth Circuit's ruling in *Copper Liquor, Inc.* v. *Adolph Coors Company*, 506 F.2d 934, wherein it was held that under the rule of *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365, 87 S. Ct. 1856, 18 L. Ed. 2d 1249 (1967), territorial restrictions were a per se violation of the Sherman Act, Del Rio saw nothing to be gained by insisting upon a continuance of its pendent claim under the Texas antitrust laws.



After, and in view of, this Court's ruling in *Sylvania*, Del Rio sought to enlarge the pre-trial order to reinstate its pendent claim under the Texas antitrust laws, which was denied by the District Court. Del Rio submitted its memorandum brief to the District Court on the question that territorial restrictions were a per se violation of the Texas antitrust laws. Del Rio also sought jury instructions in connection with the Court's charge on the rule of reason to the effect: (Pltf. Req. Inst. No. 28) that Coors' territorial restrictions were a per se violation of the antitrust laws of the State of Texas; and (Pltf. Req. Inst. No. 34) that if Coors employed its territorial restrictions as an aid to enforce price-fixing activities, that such would be unreasonable as a matter of law.[3] These requested jury instructions were refused by the trial court. Del Rio also asked that interrogatories posed to the jury, inquiring whether or not Coors fixed prices or that its territorial restrictions were unreasonable, be submitted to the jury unconditionally. However, the District Court submitted them only conditioned upon the jury's bringing in a general verdict for Del Rio in the first instance.

After a general verdict for the Defendant, Coors, Del Rio moved for judgment n.o.v., on the ground that Coors' territorial restrictions were per se illegal under the Sherman Act as being in violation of the Texas antitrust laws and, secondly, on the ground that Coors was collaterally estopped under the *Copper Liquor* and *F.T.C.* decisions. Alternately, Del Rio

[3] William Kisler Coors, Coors' highest officer, testified that a purpose of the territorial restrictions was to insure that Coors' pricing structures were adhered to. (Tr., Vol. II, pp. 135, Coors Dep., pp. 20, 21.)

moved for a new trial, upon the grounds, among many others, that it should be granted a new trial in the interest of fairness and justice to permit it to prepare and present its case under the rule of reason, in view of the fact that the law had been changed on Del Rio in the middle of the trial and without opportunity to prepare and present a rule of reason case. These motions were denied.

Upon appeal to the Fifth Circuit, Del Rio presented, as its first and primary point, the contention that, since Coors' territorial restrictions constituted a per se felony violation of the Texas antitrust laws, same must be unreasonable as a matter of law and a per se violation of the Sherman Act. The Court of Appeals overruled this, as well as Del Rio's other points on appeal, and affirmed the District Court's take nothing judgment against Del Rio in an opinion completely ignoring and avoiding any reference to the fact that Del Rio's primary contention on appeal was that Coors' territorial restrictions must be unreasonable and illegal per se as violative of the Texas antitrust laws and the public policy of the State of Texas. Del Rio's Petition for Rehearing was overruled without opinion by the Court of Appeals.

## REASONS FOR GRANTING THE WRIT

Whether a restraint on trade can or cannot be reasonable under the Sherman Act rule of reason, when same is a per se violation of the state antitrust law wherein it is imposed, is an important question of federal law which has not been, but should be, settled by this Court.

It is, and has been, long and well decided in the



State of Texas that vertical territorial restrictions imposed therein upon a distributor by a manufacturer are per se violations of the Texas antitrust law.[4] Article 1, §26, Constitution of the State of Texas; Sections 15.01, 15.02, 15.03, 15.04, and 15.33, Texas Business and Commerce Code; *Patrizi* v. *McAninch* (Tex. Sup. Ct., 1954) 296 S.W. 2d 343; *Ford Motor Co.* v. *State* (Tex. Sup. Ct., 1943) 175 S.W. 2d 230; *W. T Raleigh Co.* v. *Land* (Tex. Sup. Ct., 1926) 279 S.W. 810; *E.F.I., Inc.* v. *Marketers Intern., Inc.* (Tex. Civ. App., 1973) 492 S.W. 2d 302, ref'd. n.r.e. 506 S.W. 2d 579; *Jackson Brewing Co.* v. *Clarke* (Tex. Civ. App., 1964) 375 S.W. 2d 352, ref'd. n.r.e.; *Kelly* v. *Bryson Pipeline & Refining Co.* (Tex. Civ. App., 1942) 163 S.W. 2d 413; *Byrd* v. *Crazy Water Co.* (Tex. Civ. App., 1940) 140 S.W. 2d 334; *Burpee Tan Sealer Co.* v. *Henry McDonnell Co.* (Tex. Civ. App., 1934) 75 S.W. 2d 458, err. ref.; *Newby* v. *W. T. Raleigh Co.* (Tex. Civ. App., 1917) 194 S.W. 1173.

---

[4] Coors conceded this in its response to Del Rio's Petition for Rehearing, wherein it stated, at page 9, "The Texas cases and the state statutory provision cited by Del Rio *** seem to imply that all territorial restrictions violate the Texas antitrust laws and constitute a felony." Thereafter, Coors cited as an exception to this rule, §102.51 of the Texas Alcoholic Beverage Control Act (the provisions of which are set forth in Appendix F), which require manufacturers of beer products to designate territorial limits for their distributors. However, this Act was not enacted until 1975, almost four years after Del Rio was terminated as a Coors distributor and accordingly, has no application herein. In any event, even were it applicable, such Act would grant no refuge to Coors, since, by its terms, such territorial limits must be "non-exclusive," whereas the territorial restrictions established by Coors, granted to Del Rio, and each of its other distributors, an exclusive franchise to distribute within their designated territory.

Since the Court of Appeals failed to make any reference to this point in its opinion (as though it did not exist) it naturally stated no reason why such point was overruled. The Fifth Circuit did, however, make reference to the fact that Del Rio abandoned its pendent claim under the Texas antitrust laws. Nevertheless, Del Rio did not waive any effect that the Texas antitrust laws may have upon the Sherman Act under the rule of reason. Rather, the same was timely and properly brought to the attention of the District Court by trial brief and requested jury instructions, during the trial, and by motion for judgment n.o.v. after the jury verdict.

In the Fifth Circuit, Coors did advance the argument that the Texas antitrust laws had been preempted by the federal antitrust laws. It is hard to believe that the Court of Appeals followed this reasoning, since that circuit had expressly held, in *Woods Exploration & Pro. Co.* v. *Aluminum Co. of Amer.* (5th Cir., 1971) 478 F. 2d 1268, cert. den. 423 U.S. 833, that the federal laws did not preempt the state, and that both complemented each other. The same conclusion was reached earlier in *Mathews Conveyor Co.* v. *Palmer-Bee Co.* (6th Cir., 1943) 135 F.2d 73; *McKinney* v. *Landon* (8th Cir., 1913) 209 F. 300. So far as Del Rio can determine, this Court has never expressly ruled on this point, but its decision in *Standard Oil Co. of Kentucky* v. *Tennessee* (1910) 217 U.S. 413, 30 S. Ct. 543, 54 L. Ed. 817, has declared that the federal government has not preempted the right of state governments to regulate trade and commerce within their boundaries. Likewise, the Texas courts have uniformly held that the federal did not preempt the state antitrust laws. *Elray, Inc.* v. *Cathodic Protection Service* (Tex. Civ. App., 1974) 507 S.W. 2d 570; *E.F.I., Inc.* v. *Marketers Intern., Inc.*, supra.; and *State* v. *Southeast Tex. Chap. of Nat. Elec. Con. Ass'n* (Tex. Civ. App., 1962) 358 S.W. 2d 711, ref'd. n.r.e., cert. den. 372 U.S. 965. In any case, if such preemption existed generally, it should not apply here where the field of commerce concerns alcoholic beverages, the regulation of which has been left to the states by the 21st Amendment, as held in *Lamp Liquors, Inc.* v. *Adolph Coors Company* (D.C., Wy., 1976) 410 F. Supp. 536, reversed on other grounds, 563 F. 2d 425; *Fairfield County Beverage Distributors, Inc.* v. *Narragansett Brewing Company* (D.C., Conn., 1974) 378 F. Supp. 376. This Court repeatedly has held that the states are unconfined in the regulation of intoxicants within their borders. *Joseph E. Seagram & Sons* v. *Hostetter* (1966) 384 U.S. 35, 86 S. Ct. 1254, 16 L. Ed. 2d 336, and cases cited therein at page 42, 384 U.S.



Furthermore, there is nothing inconsistent between Texas' antitrust prohibition against territorial restraints and Section 1 of the Sherman Act as interpreted by this Court. In fact, from 1967, when this Court adopted the *Schwinn* rule, until 1977, when it made its *Sylvania* ruling, the law of both jurisdictions condemned territorial restraints as per se violations. Certainly, the *Sylvania* ruling did not hold that territorial restrictions were per se legal, but rather, held that the legality of same must be judged by the rule of reason. Therefore, Del Rio submits that the overruling of this point by the Court of Appeals cannot be sustained on any theory of federal preemption.

In deciding the legality of a territorial restriction under the rule of reason, as we must under *Sylvania*,

we must look at the particular facts and circumstances of the particular case under review. Del Rio submits that the fact and circumstance that the conduct under scrutiny constitutes a per se felony violation of the Texas antitrust laws must predominate so as to render these restrictions unreasonable and illegal per se under the Sherman Act. In applying a federal rule that has no federal standard engrafted upon it to give it certainty, such as a rule of reason inquiry, one should look to the state law to determine the state standard, as this Court has recently done in *Burks* v. *Lasker* (May 14, 1979) ___ U.S. ___ and *U.S.* v. *Kimbell Foods, Inc.* (April 2, 1979) ___ U.S. ___, 99 S. Ct. 1448, 59 L. Ed. 2d 711.

The irrefutability and correctness of Del Rio's contention, that Coors' territorial restrictions must be per se illegal under the rule of reason when same constitute a per se felony violation of the state antitrust laws, is most glaringly demonstrated by the fact that the Court of Appeals, in overruling Del Rio's contention, was totally unable to express any justification for its action and was compelled to write its opinion as though this point was not even in the case, even though it was the first and primary point urged on appeal and the main one addressed on oral argument and pointed out upon rehearing before the Court of Appeals. The conduct of the Court of Appeals, in attempting to ignore Del Rio's primary point before it, more closely fits the rule of men, than the rule of law.

To hold that it was reasonable under the federal antitrust law to commit a restraint of trade that was a per se felony violation, in the state where committed, of the very law of that state designed to prevent restraints of trade in commerce, would undoubtedly be one of the most preposterous decisions handed down in our language.



The dignity and efficacy of the antitrust laws of every state in the Union weigh in the balance of this appeal.

## CONCLUSION

This petition for writ of certiorari should be granted to decide this important Sherman Act question and in the interest of justice.

Respectfully submitted,

JAMES R. WARNCKE
1140 Milam Building
San Antonio, Texas 78205
(512) 227-6305

*Attorney For Petitioner*
*Del Rio Distributors, Inc.*

# APPENDIX



## APPENDIX A

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

---

**No. 77-2811**

---

DEL RIO DISTRIBUTING, INC.,
*Plaintiff-Appellant,*

v.

ADOLPH COORS COMPANY,
*Defendant-Appellee.*

---

**Appeal from the United States District Court for the Western District of Texas.**

---

Before GEWIN, RONEY and GEE, *Circuit Judges.*

GEWIN, *Circuit Judge:*

Del Rio appeals from the jury's finding that Coors had not violated the Sherman Act. Appellant raises several issues for review. First, the refusal of the trial court to enlarge the pretrial order by adding a count based on alleged state antitrust violations. Second, the court's refusal to grant a new trial because of a change in the applicable law during trial or because the verdict was against the weight of the evidence. Third, appellant contends that the doctrine of collateral estoppel should apply to the issue of liability. Finally, appellant cites the court's refusal to give certain special instructions that it had requested. After carefully viewing the voluminous record, we find no merit in the issues raised. The decision is affirmed.

In 1972, appellant Del Rio initiated a suit against the Adolph Coors Company alleging violations of the Sherman

Act and Texas antitrust laws. The alleged violations were the fixing of wholesale and retail prices and the limiting of territories where Coors beer could be resold. Del Rio had begun operation as a distributor of appellee's beer in Del Rio, Texas in December, 1966 and continued until Coors terminated the distributorship and it went out of business on December 1, 1971. Appellant sought damages for lost profits that it alleged would have been gained by the freedom to sell the beer without territorial and price restrictions and for loss of value of a going concern or goodwill by reason of being terminated by appellee to ensure enforcement of those restrictions.

On October 7, 1975, a Pre-Trial Conference was held, and shortly thereafter a Pre-Trial Order was submitted indicating that Del Rio was abandoning its claims under the Texas antitrust laws. The claim was expressly abandoned in the final Amended Pre-Trial Order in 1977.

The trial was commenced on June 20, 1977 with appellant presenting its case under the territorial per se *Schwinn* Rule.[1] On June 23 Del Rio rested its case. That same day the Supreme Court handed down *Continental T. V. Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 97 S.Ct. 2549, 53 L.Ed.2d 568 (1977), overruling the *Schwinn* per se rule and reinstating the "rule of reason." Thereafter, appellant moved to amend the Pre-Trial Order in an effort to reinstate its claim under the Texas antitrust laws.[2] The court denied this motion. The jury returned the verdict for appellee Coors and appellant filed motions for Judgment N.O.V. or alternatively for a new trial. Del Rio appealed

[1] *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 87 S.Ct. 1856, 18 L.Ed.2d 1249 (1967).

[2] During oral argument, in response to a question by the court, counsel for appellant stated that he did not move to reopen his case after *Sylvania* was decided because he did not have sufficient time to prepare a rule of reason case. Appellant also did not move for a continuance.



from the denial of those motions.

Appellant contends that the court erred in refusing to allow the pretrial order to be enlarged to add a count based on Texas antitrust violations. This court has previously recognized that the trial judge is vested with broad discretion in determining whether or not a pre-trial order should be modified or amended. In *Sherman v. United States*, 462 F.2d 577, 579 (5th Cir. 1972) the court stated:

> The trial judge is vested with broad discretion to preserve the integrity and purpose of a pre-trial order. Basically, these orders and stipulations, freely and fairly entered into, are not to be set aside except to avoid manifest injustice.

This position is consistent with the relevant language in Rule 16 of the Federal Rules of Civil Procedure.

Del Rio does not dispute that it clearly waived any claim that it might have had under Texas antitrust laws. The facts necessary to support Del Rio's claim under the Texas antitrust laws could have been discovered prior to the Pre-Trial Conference. However, appellant chose to abandon its claim under Texas antitrust laws and has failed to establish that the trial court abused its discretion. *Bettes v. Stonewall Insurance Co.*, 480 F.2d 92 (5th Cir. 1973).

As a corollary to appellant's contention that the court should have enlarged the pre-trial order, appellant also contends that the court erred in refusing to grant a new trial. Again Del Rio's argument is based on its reliance that the decision would be rendered under the *Schwinn* per se doctrine and in line with *Copper Liquor, Inc. v. Adolph Coors Co.*, 506 F.2d 934 (5th Cir. 1975).

Under Rule 59(a) of the Federal Rules of Civil Procedure a new trial may be granted where the action has been tried by a jury "for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of

the United States."

The only authority the appellant cites for its position is *Hampton v. Graff Vending Co.*, 516 F.2d 100 (5th Cir. 1975) where this circuit remanded that case because of a change in the law of this circuit between the first and second appeals. In contrast, the change in the law in the instant case occurred during the trial because of a decision of the Supreme Court. Although, on its face, a remand might appear more compelling, there are several factors that distinguish the case at bar from *Hampton*.

First, appellant made a voluntary waiver of any claim it might have had based on any alleged state antitrust violations. This waiver occurred after the Supreme Court had granted certiorari in the *Sylvania* case. Thus, the argument of surprise carries less weight. Finally, appellant has failed to establish that any manifest injustice occurred because of the continuation of the trial.[3]

Del Rio contends that adverse judgments entered against Coors in *Adolph Coors Co. v. Federal Trade Commission*, 497 F.2d 1178 (10th Cir. 1974), and *Copper Liquor, Inc. v. Adolph Coors Co.*, 506 F.2d 934 (5th Cir. 1975) serve as collateral estoppel on the issue of liability.[4] We disagree and find several bases for distinguishing those cases. One of the most obvious distinctions of *Copper Liquor* is that it was decided under the per se rule of *Schwinn* that has now been replaced by the rule of reason under *Sylvania*.

[3] In commenting on Rule 59, Wright and Miller has observed:

> Rule 59 gives the trial judge ample power to prevent what he considers to be a miscarriage of justice. . . . Courts do not grant new trials unless it is reasonably clear that prejudicial error has crept into the record or that substantial justice has not been done, and the burden of showing harmful error rests on the party seeking the new trial. Ultimately the motion invokes the sound discretion of the trial court, and appellate review of its ruling is quite limited.

11 Wright & Miller, Federal Practice & Procedure § 2803, at 31-33 (3d ed. 1973).



The F.T.C. case, decided in another circuit, was based on an appeal of an F.T.C. cease and desist order brought under § 5 of the Federal Trade Commission Act. The Federal Trade Commission had over-turned the decision of an administrative law judge who had found no violation of the act. In reaching its decision on vertically imposed territorial restrictions, the Tenth Circuit was compelled to rely on law in effect at that time; the *Schwinn* per se rule.

In light of the reliance on *Schwinn* in both *Copper Liquor* and the F.T.C. case we hold that the doctrine of collateral estoppel has no application in the instant case.

Del Rio further argues that the verdict was against the weight of the evidence. However, a perusal of the records reveals that there was ample evidence from which the jury could have reasonably concluded that Coors' territorial restrictions were reasonable and that Coors did not engage in retail and wholesale price fixing.

Several witnesses testified that territories were essential to maintaining quality control and service in the retail market. There was a good deal of testimony concerning Coors' unique brewing process and the necessity for refrigeration and regular stock rotation to ensure quality and flavor maintenance. Also, one of the expert witnesses testified that by assigning exclusive distributorships, there was a long-term effect of making each distributorship stronger, better able to compete with other brands and provide better service. While appellee concedes that the

[4] We also find that the trial judge did not err in refusing to take judicial notice of *Adolph Coors Co. v. Federal Trade Commission*, 497 F.2d 1178 (10th Cir. 1974) or in refusing to enter into evidence the F.T.C. Complaint and the F.T.C. Cease and Desist Order. Trial Record Vol. IV, pp. 235-37.

evidence related to price fixing is sharply divided, there was testimony upon which the jury could have concluded that Coors was not guilty of price fixing.

The final allegation of Del Rio relates to the court's refusal to give to the jury certain special instructions requested by appellant and the use of two general verdict forms and four interrogatories to be answered in the event a verdict was returned for Del Rio. A careful scrutiny of the entire jury charge establishes that the jury was properly advised on the applicable law. The use of interrogatories in conjunction with general verdict forms is consistent with Rule 49(b) of the Federal Rules of Civil Procedure. Thus, we find no merit in Del Rio's allegations of error.

Having carefully considered each of the issues raised on appeal and finding no merit in them, the judgment is AFFIRMED.



## APPENDIX B

UNITED STATES COURT OF APPEALS

No. 77-2811

---

**D. C. Docket No. MO-72-CA-34**

---

DEL RIO DISTRIBUTING, INC.,

Plaintiff-Appellant,

*v.*

ADOLPH COORS COMPANY,

Defendant-Appellee.

*Appeal from the United States District Court for the Western District of Texas*

---

Before GEWIN, RONEY and GEE, *Circuit Judges.*

**Judgment**

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It if further ordered that the plaintiff-appellant pay to the defendant-appellee the costs on appeal, to be taxed by the Clerk of this Court.

February 6, 1979

## APPENDIX C

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

OFFICE OF THE CLERK

---

May 7, 1979

TO ALL PARTIES LISTED BELOW:

No. 77-2811 - Del Rio Distributing, Inc. vs. Adolph Coors Co.

---

Dear Counsel:

This is to advise that an order has this day been entered denying the petition ( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the petition ( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH, *Clerk*

By Rosalie C. Vasino /s/
Deputy Clerk



## APPENDIX D

Relevant provisions of the 21st Amendment to the Constitution of the United States:

> "Sec. 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

Relevant provisions of Section 1 of the Sherman Act, §1, 26 Stat. 209 (1890), 15 U.S.C. §1:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."

## APPENDIX E

Article 1, Section 26, of the Texas Constitution provides:

> "Perpetutities and monopolies are contrary to the genius of a free government, and shall never be allowed, nor shall the law of primogeniture or entailments ever be enforced in this State."

### Texas Business And Commerce Code (Effective September 1, 1967)

### Section 15.01. Monopoly Defined

A "monopoly" is a combination or consolidation of two or more corporations effected by

(1) bringing the direction of their affairs under common management or control to create, or where the common management or control tends to create, a trust as defined in Section 15.02 of this code; or

(2) one corporation acquiring (in whole or part and whether directly, through trustees, or otherwise) the stock, bonds, franchise or other rights, or physical property of one or more other corporations to prevent or lessen, or where the acquisition tends to prevent or lessen, competition.

(R.S. Art. 7427; P.C. Art. 1633.)

Acts 1967, 60th Leg., vol. 2, p. 2343, ch. 785, § 1.

### §15.02. Trust Defined

(a) In this section, unless the context requires a different definition, "person" does not include municipal corporation. (No source citation.)

(b) A "trust" is a combination of capital, skill, or acts by two or more persons to

(1) restrict, or tend to restrict, trade, commerce, aids to commerce, the preparation of tangible personal property for market or transportation, or the free pursuit of a lawful business; or



(2) fix, maintain, increase, or reduce the price of tangible personal property, the cost of insurance, or the cost of preparing tangible personal property for market or transportation; or

(3) prevent or lessen competition in

(A) the manufacture, transportation, sale, or purchase of tangible personal property;

(B) the business of insurance;

(C) aids to commerce; or

(D) preparing tangible personal property for market or transportation; or

(4) affect, control, or establish the price of tangible personal property, or the cost of transportation, insurance, or preparing tangible personal property for market or transportation; or

(5) agree

(A) not to sell, dispose of, transport, or prepare tangible personal property for market or transportation, or not to make an insurance contract, at a price below a common standard or figure;

(B) to maintain the price of tangible personal property, the charge for transportation or insurance, or the cost of preparing tangible personal property for market or transportation at a fixed or graded figure;

(C) to affect or maintain the price of tangible personal property or the cost of transportation, insurance, or preparing tangible personal property for market or transportation in order to

preclude free competition between or among themselves or others in the sale or transportation of tangible personal property, in the business of transportation or insurance, or in preparing tangible personal property for market or transportation; or

(D) to pool, combine, or unite an interest they have in the sale or purchase of tangible personal property, or in the charge for transportation, insurance, or preparing tangible personal property for market or transportation, so that the price of the tangible personal property, or charge for transportation, insurance, or preparing tangible personal property for market or transportation, might be in any manner affected; or

(6) regulate, fix, or limit the output of tangible personal property, or the amount of insurance undertaken, or the amount of work performed in preparing tangible personal property for market or transportation; or

(7) refrain from engaging in business, or from buying or selling tangible personal property, partially or entirely in this state.

(R.S. Art. 7426; P.C. Art. 1632)

Acts 1967, 60th Leg., vol. 2, p. 2343, ch. 785, § 1.

### §15.03. Conspiracy in Restraint of Trade Defined

(a) It is a conspiracy in restraint of trade for

(1) two or more persons engaged in buying or selling tangible personal property to agree not to buy from or sell to another person tangible personal property;



(2) two or more persons to agree to boycott, or threaten not to buy from or sell to, a person because that person buys from or sells to another person; (R.S. Art. 7428, subdiv. 1 and 2; P.C. Art. 1634, subdiv. 1 and 2.)

(3) two or more persons to agree to boycott, or not to deal with, the tangible personal property of another person; or (R.S. Art. 7428, subdiv. 3 (part), amd. by 50th Legis., Ch. 310, Sec. 1; P.C. Art. 1634, subdiv. 3 (part), amd. by 50th Legis., Ch. 309, Sec. 1.)

(4) an employer and labor union or other organization to agree or combine so that

(A) a person is denied the right to work for an employer because of membership or nonmembership in the labor union or other organization; or

(B) membership or nonmembership in the labor union or other organization is made a condition of obtaining or keeping a job with the employer. (R.S. Art. 7428–1.)

(b) It is not a conspiracy in restraint of trade for

(1) employees to agree to quit their employment, or to refuse to deal with tangible personal property of their immediate employer, unless their refusal to deal with tangible personal property of their immediate employer is intended to induce, or has the effect of inducing, that employer to refrain from buying or otherwise acquiring tangible personal property from a person; or (R.S. Art. 7428, subdiv. 3 (part), amd. by 50th Legis., Ch. 310, Sec. 1; P.C. Art. 1634, subdiv. 3 (part), amd. by 50th Legis., Ch. 309, Sec. 1.)

(2) persons to agree to refer for employment a migratory farm worker who works on seasonal crops if the referral is made irrespective of whether or not the worker belongs to a labor union or other organization. (52nd Legis., Ch. 494, Sec. 2.)

Acts 1967, 60th Leg., vol. 2, p. 2343, ch. 785, § 1.

## §15.04. Monopoly, Trust, and Conspiracy in Restraint of Trade Prohibited; Agreement Violating Prohibition Void

(a) Every monopoly, trust, and conspiracy in restraint of trade, as defined in Sections 15.01, 15.02, and 15.03 of this code, respectively, is illegal and prohibited. (R.S. Art. 7429.)

(b) An agreement violating the prohibition against a monopoly, trust, or conspiracy in restraint of trade contained in Subsection (a) of this section is void and unenforceable in law or equity. (R.S. Art. 7437.)

Acts 1967, 60th Leg., vol. 2, p. 2343, ch. 785, § 1.

## §15.33. Criminal Penalties

(a) A person may not agree to form, form, be a party to the formation of, or aid a monopoly, trust, or conspiracy in restraint of trade, as defined in Sections 15.01, 15.02, and 15.03(a) (1)-(3) of this code, respectively. (P.C. Art 1637.)

(b) A person acting as a member, agent, employee, officer, director, or stockholder of a business, firm, corporation, or association may not

(1) sell, purchase, contract, do business or any other act for, or form or operate, the business, firm, corporation, or association in violation of the prohibition against a monopoly, trust, and conspiracy in restraint of trade, as defined in Sections 15.01, 15.02, and 15.03(a) (1)-(3) of this code, respectively; or



(2) in this state, with an intent to drive out competition or financially injure a competitor,

(A) sell a product below the cost of its manufacture or production;

(B) give away a product; or

(C) give a secret rebate on the sale price of a product. (P.C. Art. 1638.)

(c) A person who forms outside this state a monopoly, trust, or conspiracy in restraint of trade, as defined in Sections 15.01, 15.02, and 15.03(a) (1)-(3) of this code, respectively, may not, with respect to the monopoly, trust, or conspiracy in restraint of trade,

(1) cause or permit it to do business, operate, or have an effect in this state;

(2) aid it to do business in this state or otherwise violate the prohibition against a monopoly, trust, or conspiracy in restraint of trade, as defined in Sections 15.01, 15.02, and 15.03(a) (1)-(3) of this code, respectively; or

(3) buy, sell, or contract for it.

(P.C. Art. 1639 (part).)

(d) A person who violates a provision of Subsection (a), (b), or (c) of this section is guilty of a felony and upon conviction is punishable by imprisonment in the penitentiary for not less than 2 nor more than 10 years. (P.C. Art. 1639 (part).)

(e) A criminal prosecution under this section may be brought in Travis or any other county in which a monopoly, trust, or conspiracy in restraint of trade is allegedly

operating (P.C. Art. 1641.) Acts 1967, 60th Leg., vol. 2, p. 2343, ch. 785, § 1.

**Texas Antitrust Statutes In Effect Prior To September 1, 1967**

## Art. 7426. [7796] "Trusts"

A "trust" is a combination of capital, skill or acts by two or more persons, firms, corporations or associations of persons, or either two or more of them for either, any or all of the following purposes:

1. To create, or which may tend to create, or carry out restrictions in trade or commerce or aids to commerce or in the preparation of any product for market or transportation, or to create or carry out restrictions in the free pursuit of any business authorized or permitted by laws of this State.

2. To fix, maintain, increase or reduce the price of merchandise, produce or commodities, or the cost of insurance, or of the preparation of any product for market or transportation.

3. To prevent or lessen competition in the manufacture, making, transportation, sale or purchase of merchandise, produce or commodities, or the business of insurance, or to prevent or lessen competition in aids to commerce, or in the preparation of any product for market or transportation.

4. To fix or maintain any standard or figure whereby the price of any article or commodity of merchandise, produce or commerce, or the cost of transportation, or insurance, or the preparation of any product for market or transportation, shall be in any manner affected, controlled or established.

5. To make, enter into, maintain, execute or carry out any contract, obligation or agreement by which the parties



thereto bind, or have bound themselves not to sell, dispose of, transport or to prepare for market or transportation any article or commodity, or to make any contract of insurance at a price below a common standard or figure or by which they shall agree in any manner to keep the price of such article or commodity or charge for transportation or insurance, or the cost of the preparation of any product for market or transportation at a fixed or graded figure, or by which they shall in any manner affect or maintain the price of any commodity or article or the cost of transportation or insurance, or the cost of the preparation of any product for market or transportation between them or themselves and others, to preclude a free and unrestricted competition among themselves or others in the sale or transportation of any such article or commodity, or business of transportation or insurance, or the preparation of any product for market or transportation, or by which they shall agree to pool, combine or unite any interest they may have in connection with the sale or purchase of any article or commodity, or charge for transportation or insurance or charge for the preparation of any product for market or transportation whereby its price or such charge might be in any manner affected.

6. To regulate, fix or limit the output of any article or commodity which may be manufactured, mined, produced or sold, or the amount of insurance which may be undertaken, or the amount of work that may be done in the preparation of any product for market or transportation.

7. To abstain from engaging in or continuing business, or from the purchase or sale of merchandise, produce or commodities partially or entirely within the State of Texas, or any portion thereof. Acts 1903 p. 119.

## Art. 7427. [7797] "Monopoly" defined

A monopoly is a combination or consolidation of two or more corporations when effected in either of the following

methods:

1. When the direction of the affairs of two or more corporations is in any manner brought under the same management or control for the purpose of producing, or where such common management on control tends to create a trust as defined in the first article of this chapter.

2. Where any corporation acquires the shares or certificates of stock or bonds, franchise or other rights, or the physical properties or any part thereof, of any other corporation or corporations, for the purpose of preventing or lessening, or where the effect of such acquisition tends to affect or lessen competition, whether such acquisition is accomplished directly or through the instrumentality of trustees or otherwise. Id.

## Art. 7428. [7798] Conspiracies against trade

Either or any of the following acts shall constitute a conspiracy in restraint of trade:

1. Where any two or more persons, firms, corporations or associations of persons, who are engaged in buying or selling any article of merchandise, produce or any commodity, enter into an agreement or undertaking to refuse to buy from or sell to any other person, firm, corporation or association of persons, any article of merchandise, produce or commodity.

2. Where any two or more persons, firms, corporations or associations of persons, shall agree to boycott or threaten to refuse to buy from or sell to any person, firm, corporation or association of persons for buying from or selling to any other person, firm, corporation or association of persons.

3. Where any two or more persons, firms, corporations or associations of persons shall agree to boycott, or enter into any agreement or understanding to refuse to transport, deliver, receive, accept, erect, assemble, operate, use



or work with any goods, wares, merchandise, articles or products of any other person, firm, corporation or association of persons; provided, however, that this subdivision of this Article shall not be construed to apply to an agreement between employees to terminate their employment, or to refuse to transport, deliver, receive, accept, erect, assemble, operate, use or work with the goods, wares, merchandise, articles or products of their immediate employer unless such refusal is intended or calculated to induce, or shall have the effect of inducing, such employer to refrain from purchasing or from otherwise acquiring goods, wares, merchandise, articles or products from any person, firm, corporation or association of persons. Acts 1903 p. 119; Acts 1947, 50th Leg. p. 530, ch. 310 § 1.

## APPENDIX F

### Texas Alcoholic Beverage Code

### §102.51. Setting of Territorial Limits

(a) Each holder of a manufacturer's or nonresident manufacturer's license shall designate territorial limits in this state within which the brands of beer the licensee manufactures may be sold by general, local, or branch distributor's licensees.

(b) Each holder of a general, local, or branch distributor's license shall enter into a written agreement with each manufacturer from which the distributor purchases beer for distribution and sale in this state setting forth the nonexclusive territorial limits within which each brand of beer purchased may be distributed and sold. A copy of the agreement and any amendments to it shall be filed with the administrator.

(Effective September 1, 1975)